U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 19Jun2002

CASE NO.: 2001-LHC-1975

OWCP NO.: 07-158147

IN THE MATTER OF:

RICHARD E. BEARD

Claimant

v.

DELTA CATERING

Employer

and

LIBERTY MUTUAL INSURANCE CO.

Carrier

APPEARANCES:

RICHARD HOBBS BARKER, ESQ.

For The Claimant

SCOTT B. KIEFER, ESQ.

For The Employer

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor

Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Richard E. Beard (Claimant) against Delta Catering (Employer) and Liberty Mutual Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 8, 2002, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 3 exhibits and Employer/Carrier proffered 22 exhibits which were admitted into evidence along with one joint exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on April 19, 2002. Employer requested an opportunity to file and filed a reply brief.

Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. Employer was notified of the alleged accident/injury on October 23, 2000.

2. Employer filed Notice of Controversion on October 24, 2000.

3. That an informal conference before the District Director was held on March 29, 2001.

4. That no medical benefits have been paid.

II. ISSUES

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer/Carrier's Exhibits: EX-___.

The unresolved issues presented by the parties are:

1. Fact of injury.

2. If an injury did occur, was timely notice of same provided to Employer under Section 912 of the Act.

3. Causation of Claimant's alleged back, neck and shoulder complaints.

4. Claimant's entitlement to temporary total disability benefits or medical expenses.

5. Nature and extent of disability.

6. Average weekly wage and compensation rate.

7. Employer's bad faith discharge of employee.

8. Employer's bad faith refusal initially to authorize medical treatment.

9. Employer's bad faith denial of compensation benefits.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant is a 37 year-old man. Although he left school at the age of 16, he has approximately a third grade education in special education classes. (Tr. 28). Claimant testified he cannot read or write very well but is able to recognize certain familiar words. (Tr. 32).

Claimant's first experience in the work force was in landscaping. He moved into the food industry working for a Piccadilly Cafeteria in Baton Rouge, LA. In 1992, Claimant became a full-time janitor for the Tangipahoa Parish School Board for nine months out of the year. (Tr. 28-29).

Claimant suffered a neck strain in 1997, while working for the school board. However, he did not miss a significant amount of work. (Tr. 31). He did attend physical therapy for about six months and received Workers' Compensation, as well as payment of all medical expenses for the accident. (Tr. 59). Additionally, Claimant has epilepsy but has not had an episode or seizure since

childhood. (Tr. 32-33).

At the time of the accident, Claimant was working for Employer as a galley hand under the supervision of Nick Nicholson. Claimant's duties generally included helping in the kitchen, washing dishes, making beds, cleaning bathrooms and other odd jobs. (Tr. 33-34).

On August 16, 2000, Claimant took the workers a pot of hot soup on a rolling cart, as he often did. When the elevator stopped, it was not level with the platform floor, and as he attempted to exit the front wheels of the cart twisted and fell into the gap. The cart tilted forward and the pot began to fall. When Claimant reached for the pot to stop the soup from spilling, some of it splashed out of the pot, and landed on his hands. (Tr. 34-35). He claimed the soup was hot enough to burn his hands, despite the fact he was wearing latex rubber gloves. (Tr. 67).

Claimant pushed the cart out of the elevator into the hallway, and returned to the elevator to retrieve the lid which had fallen. As he was standing up, the doors of the elevator closed on him. In response, Claimant twisted around and struggled with the door, which was pushing on him, in an attempt to open it. (Tr. 34-35).

After stabilizing the elevator door, Claimant called for Ken McGee, another employee, to help with the spillage. While the two cleaned up, Claimant realized the reason the accident had occurred was because the elevator and floor levels were not properly aligned. (Tr. 36). Mr. McGee told Claimant that the accident may not have happened if Claimant had proceeded to pull the cart backwards instead of pushing it forward. (Tr. 38).

After cleaning the mess, Claimant restocked the pot with soup and served the men. He then returned to the kitchen where his supervisor, Mr. Nicholson, examined him and asked about his hands. (Tr. 39). At Mr. Nicholson's suggestion, Claimant applied burn cream to his hands and continued with his shift. (Tr. 40). Claimant obtained the cream from the kitchen. He had used it during his first hitch on the Shell Auger, when bleach water burned his hands. Claimant testified he received the cream from the medic, and then he was told to keep it in the kitchen. (Tr. 40-41).

Claimant worked two days after the accident, finishing his hitch on August 18, 2000. However, the day after the accident, August 17, 2000, the Claimant complained to Dennis Swanson, the

on-duty medic, of numbness and a "constant throb" in his arm and neck. Claimant likened the feeling to sleeping on your arm, and Mr. Swanson told him it was probably just that. Claimant returned to work, but the symptoms worsened. Claimant experienced pain in his shoulder and neck, and numbness all the way down his right arm. (Tr. 42).

No written accident report was generated, and Claimant stated he was unaware of the requirement for such. Claimant did not recall receiving an employee manual, but was certain he had not read one or been made aware of its existence. (Tr. 50-51). However, he remembered viewing safety films and attending classes at the onset of his employment with Employer. (Tr. 57). The week following the incident, Claimant had communications with Employer's representatives, including Mr. Nicholson, regarding his return to work. However, Claimant informed Employer he was unable to return due to his pain. (Tr. 50-51). Claimant's symptoms continued to worsen, and one week after the accident he went to North Oaks Hospital emergency room in Hammond, Louisiana.

Claimant was told by the emergency room physician he needed to consult a neurologist, however, after following up with that recommendation, Claimant realized he was unable to afford one at that time. Claimant contacted Employer about an "insurance claim" for health insurance because he "needed some help at this moment." He was told he had not worked there long enough to qualify for assistance, and was no longer employed by Employer. (Tr. 43-45). Claimant then hired an attorney. (Tr. 51).

Claimant was next treated by Dr. Reyes, who was recommended to him by Claimant's attorney. Dr. Reyes performed an MRI, and told Claimant he should not return to work and should take care not to further injure his back. At present, Claimant still experiences numbness and pain however he now has a popping sensation in his shoulder when he twists his arm around. (Tr. 52-53). His neck gets tense and "drawn up" on occasion. Additionally, Claimant has lower back pain, and pain and cramping in his legs, particularly on the left side, which he attributes to the accident. He first remembered reporting these symptoms about one month after the accident. (Tr. 70-71).

Claimant is currently taking Vicodin to relieve his symptoms, and has not been in any other accidents which could have caused his injuries, other than his accident at work on August 16, 2000. (Tr. 54-55). However, he recalled having some difficulty with his right wrist prior to the accident. A physician treated his wrist problem with a wrist brace, and it

cured itself within one week. (Tr. 69).

Claimant applied for Social Security disability benefits, but his application was denied. He also testified that from the time of his work accident until the present, he has never owned an answering machine and therefore could not have received any messages Employer claims to have left for him regarding his employment. (Tr. 146).

Kenneth McGee

Mr. McGee testified by telephone deposition on December 10, 2001. He is a ten-year employee of Employer and worked two shifts, or about two months, with Claimant on the Shell Auger. Mr. McGee was working the same shift on the Shell Auger as Claimant on August 16, 2000. (EX-12, pp. 7, 9). On that date, Mr. McGee was the lead bedroom roustabout, which required him to work primarily in the laundry room, but he also helped the first and fourth floor roustabouts make the beds and empty the trash. Mr. McGee testified Claimant was a bedroom roustabout assigned to the first and second floors that day. (EX-12, pp. 7-8).

Mr. McGee testified he did not see Claimant's accident when it occurred. He did not hear Claimant call for help, but when he saw Claimant wiping up spilled soup on the fourth floor near the elevator, he helped Claimant clean up the rest of the mess. Mr. McGee did not testify whether or not Claimant told him how the spill occurred, but he stated Claimant never told him about, nor indicated the elevator was uneven with the platform floor. (EX-12, pp. 9-10, 16). He testified he did not see any burns on Claimant's hands, Claimant did not show him burns on his hands, and that he did not tell Claimant to put lotion on his hands. (EX-12, pp. 10, 16). He also testified Claimant appeared normal, and that Claimant never told him then, or anytime thereafter, he suffered injuries to his neck, shoulder or back as a result of the accident. Mr. McGee stated Claimant finished his hitch without any complaints of injury. (EX-12, pp. 10-11, 14).

Mr. McGee affirmed he had never had any problems with the elevator on the Shell Auger, and he did not know of anyone else having any problems with the elevator. He stated at the time of the accident he did not see the gap between the floor and the elevator, and Claimant did not point it out to him. (EX-12, pp. 12, 16). However, Mr. McGee did not deny that he told Claimant he could have avoided the accident by backing out of the elevator.

Mr. McGee also testified the process of reporting incidents

on the Shell Auger is discussed in the Employer's employee manual, at orientation and at safety meetings. Employees have to sign a document verifying they read the manual. (EX-12, pp. 13-14). Mr. McGee stated they talk about safety and the immediate reporting of all incidents, no matter how small, "all the time." To report an incident, an employee must first go to his immediate supervisor, then to the executive supervisor who in turn notifies the Shell supervisor, after which the employee is to report to the medic on duty. (EX-12, pp. 14, 12). To Mr. McGee's knowledge, there is supposed to be a first aid kit in the kitchen with burn ointment, but everyone goes to the medic to get the ointment and report their incident. (EX-12, pp. 19-20).

Mr. McGee stated that after Claimant finished his hitch on the Shell Auger, Mr. Nicholson placed him on several crew changes. When Claimant did not show up to work, Mr. Nicholson called his house and talked to Claimant's mother, who stated Claimant just overslept. (EX-12, p. 11). Mr. McGee did not testify as to why no one wrote up a report on Claimant's accident.

Yvonneiscka "Nick" Nicholson

Mr. Nicholson submitted a signed statement to Employer on October 23, 2000. The parties stipulated to the admissibility of the statement as evidence, and waived any hearsay objections, in the absence of finding Mr. Nicholson and securing his deposition.[2] (Tr. 8-9). Upon the close of the record Mr. Nicholson had not been found, and his statement was admitted into evidence. (EX-20).

Mr. Nicholson stated that on August 16, 2000, Employer's employees reported to him there had been a spill in the elevator. He did not state if he approached Claimant, or if it was Claimant who approached him, but Mr. Nicholson stated he talked to Claimant and asked him what happened. Claimant told Mr. Nicholson the front wheels of his cart got jammed in the elevator tracks, causing the soup to spill over. Mr. Nicholson asked Claimant if he hurt himself, to which Claimant responded "NO." Mr. Nicholson stated Claimant continued to work the rest of his hitch without complaining of any injury. (EX-20, p. 1). He did not explain why there was no report generated for Claimant's accident.

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[2] The record remained open to allow the parties an opportunity to locate Mr. Nicholson and secure his deposition, however, their efforts were unsuccessful.

Kevin Eugene

Mr. Eugene testified by deposition on February 5, 2002. He has worked for Delta Catering for five years, spending four of those years on the Shell Auger as both steward and relief executive steward. (EX-24, pp. 8-9, 20). His duties as steward are that of a day cook; he is in charge of preparing lunch and dinner for the crew; and supervises the men working in the galley. Mr. Eugene is second in command to the executive steward, and acts as relief executive steward when the executive steward is not working. (EX-24, pp. 9, 16). As relief executive steward, Mr. Eugene performs paperwork duties such as preparing the grocery orders and time sheets, conducting daily meetings for employees, and other general supervisory functions. Specifically, employees are to report any accidents to him. (EX-24, pp. 9-10).

Mr. Eugene shares the duties of conducting daily safety meetings with the executive steward, conducting all of the meetings when the executive steward is absent, and some of them while the executive steward is present. Each day they discuss a different topic such as knife handling, lifting heavy objects, how to report incidents, and emphasize any recent accidents to prevent them from happening again. (EX-24, p. 12). The immediate reporting of incidents is discussed at the daily meetings as well as in the employee handbook and manual, and at orientation. He testified all employees have to sign a document verifying they read the handbook and manual. (EX-24, p. 18).

Mr. Eugene worked with Claimant on the Shell Auger for a couple of hitches; he thought Claimant to be an average worker, and did not know of Claimant ever being reprimanded or disciplined. Mr. Eugene was working the same shift as Claimant on August 16, 2000. (EX-24, pp. 13, 27). Although he did not see Claimant's incident, Mr. Eugene knew there was soup spilled because he had to dish out more to take to the crew. He does not remember who told him of the incident, and does not recall Claimant telling him of the incident. (EX-24, pp. 14-15).

Mr. Eugene stated Claimant never told him that he burned his hands, or hurt his back, shoulders or neck while working on the Shell Auger. He testified Claimant never complained to him of any injuries or difficulties completing work duties while on the Shell Auger, and Claimant finished out his hitch without any complaints. (EX-24, pp. 15-16). Mr. Eugene never talked to Claimant after Claimant finished his hitch on the Shell Auger, nor did he try to contact Claimant to ask him to return to work. Mr. Eugene first became aware of Claimant's claim when Claimant's lawyer contacted him a few weeks after the incident. (EX-24, pp.

21, 16).

In Mr. Eugene's four years on the Shell Auger, he never heard of any complaints about the elevator, and did not know of any mechanical problems with the elevator. He stated the elevator on the Shell Auger is similar to one in an office building, and if the door starts to close you can hit a railing to open it back up. (EX-24, p. 20). Additionally, Mr. Eugene testified there are no first aid supplies in the kitchen, and an employee must see the medic for any burn ointment. However, the medic would probably let the employee take the ointment with him to use over a period of a few days. (EX-24, p. 25).

Alvin Thomas, Jr.

Mr. Thomas testified by telephone deposition on December 10, 2001. He has worked for Delta Catering for six years, and on the Shell Auger is the day cook who prepares meals, checks bedrooms and checks on the rest of the day workers. He is third in command under the executive steward and the relief executive steward. (EX-13, pp. 6-7, 16).

Mr. Thomas worked with Claimant on the Shell Auger for a total of five weeks, and was on the Shell Auger on August 16, 2000. (EX-13, pp. 6-7). He stated he did not see Claimant's accident, and Claimant never told him he hurt his neck, back or shoulders, or burned his hands while on the Shell Auger. Mr. Thomas testified Claimant never complained of having any injuries while on the Shell Auger. He stated Claimant never expressed having any difficulties performing his job duties and completed his hitch without any problems. (EX-13, pp. 9-10).

Mr. Thomas testified that two weeks after Claimant left his hitch, Mr. Nicholson attempted to call Claimant to find out where he was and why he did not return to work. Mr. Thomas first learned of Claimant's complaint when a lawyer called about three weeks after Claimant went home. (EX-13, pp. 11-12). Mr. Thomas never attempted to call Claimant after they completed their hitch together, and Claimant never told him after leaving the Shell Auger that he had an accident. He stated there was no "Calvin" on the Shell Auger at the time of the incident, but there was a Kevin. Mr. Thomas did not know of anybody calling him Calvin by mistake, and has never heard Claimant call him Calvin. (EX-13, p. 14).

Mr. Thomas affirmed the process of reporting any incidents on the Shell Auger. If an employee has an incident they are required to go to their immediate supervisor who would

then write a report and take them to the medic. This process was communicated to all of the workers at orientation, in the employee handbook and manual, and at daily safety briefings. (EX-13, pp. 12-13). He confirmed this is the procedure an employee would follow if he burned himself in the kitchen, adding that the only place to get burn ointment is from the medic. (EX-13, pp. 23-24).

Dennis Swanson

Mr. Swanson is now retired, but served in the military for twenty-four years in the medical field. He then worked in safety-medical for eight and one-half years on offshore sites. (Tr. 100-102). Most recently, Mr. Swanson was employed by Transocean Sedco Forex as a rig safety training coordinator. His duties included checking the rig to make sure it was up to par on all safety and environmental policies, and that there were no violations. Additionally, Mr. Swanson served as the rig medic. He operated an on-site "hospital," and was on call twenty-four hours-a-day. There was only one medic on the rig at any particular time, and it was his sole responsibility to administer all necessary medical treatment. (Tr. 102-104).

Mr. Swanson was the Shell Auger's rig medic on duty the day of Claimant's alleged accident. He testified it was his Employer's, as well as his own policy, to keep a log of all patients seen and treated on the rig. (Tr. 105-106). There was nothing in the monthly rig treatment logs for the month of August 2000 pertaining to Claimant. (Tr. 107; EX-2). He did not testify to the existence of a log entry for the bleach burns Claimant sustained during his first hitch on the Shell Auger.

When an employee presented to Mr. Swanson with a complaint, Mr. Swanson asked the person a set of questions regarding the time, place and nature of the incident, and then entered the information into the log. When an injury was involved, an on-the-job injury/illness report was filled out. Typically, a copy of this report was provided to Employer for its records. (Tr. 109-111).

Additionally, Mr. Swanson asked his patients if they had informed their supervisor of the complaint being made, and, if they had not, Mr. Swanson did so at that time. Mr. Swanson had no recollection of Claimant ever coming to him complaining of numbness in his arm, or with any medical complaint. (Tr. 112-113). However, he testified it is possible Claimant had come to see him asking for an opinion and not for treatment, in which event no entry is made into the medic log. (Tr. 114).

Marcia Marney

Ms. Marney has worked for the Employer for nineteen years, and has served as the general manager for approximately the past five years. Her duties include investigation of all alleged accidents and accident reports.

According to her testimony, it is Employer's policy that all incidents, no matter how minor, be reported so that an investigation can take place and an accurate history maintained. All employees are subjected to a pre-employment orientation in which the Employer's policies are laid out. (Tr. 73-74). This orientation includes reviewing films, safety manuals, and handbooks. After the completion of orientation, every employee is tested on the material presented and their understanding of it is made clear in writing.

It is Employer's policy to prepare a written accident report in every case of a claimed accident or injury. Additionally, there are daily and weekly safety meetings for all employees to ensure everyone is aware of Employer's guidelines and to keep supervisors current. When an accident occurs, the senior person-in-charge should immediately contact Ms. Marney by telephone. (Tr. 76-75). The one item repeated consistently in the orientation process and employee manuals is the importance of reporting incidents. Since Employer often hires people of limited education, safety regulations and other important policies are communicated frequently and with special attention. (Tr. 84).

Ms. Marney was familiar with both Claimant's work site and his supervisor, Mr. Nicholson, at the time of the alleged incident. In her prior dealings with Mr. Nicholson, Ms. Marney testified that he had followed company policy by immediately reporting accidents to her. (Tr. 77-78).

Ms. Marney first became aware of Claimant's alleged accident when she received a notice from the Department of Labor asking for compensation. To the best of her knowledge, this was the first notice to Employer that Claimant was seeking compensation. (Tr. 78).

Upon being notified of Claimant's claim, Ms. Marney contacted Mr. Nicholson and Mr. McGee, who, along with Mr. Eugene, provided statements concerning their knowledge of the events on the day of the accident. (Tr. 79). Ms. Marney also contacted Mr. Swanson, the medic, to inquire if he had any knowledge of Claimant's accident. Mr. Swanson reported he was unaware of any incident involving Claimant, and he had not

distributed any medication to him. (Tr. 79-80). Ms. Marney testified it is difficult to conduct an investigation of an incident two months after it occurs, but she did not specify who she was unable to contact in this matter. (Tr. 81).

Based on her investigation, Ms. Marney concluded Claimant accidently spilled some soup, but sustained no injury. Furthermore, she knew of no complaints or accidents involving the elevator at the site. (Tr. 83).

On cross-examination, Ms. Marney admitted that if Mr. Nicholson or any other employee had failed to report an accident, they would be subject to reprimand. Additionally, Employer had no record of an accident in which Claimant had allegedly suffered burns from spilt bleach. (Tr. 86).

Ms. Marney testified it is Employer's policy to keep more than one contact number for all employees. These numbers are provided by the employee upon being hired. When a dispatcher is attempting to reach an employee, they would try all of the contact numbers provided. (Tr. 150-152).

Hope Bartholomew

Ms. Bartholomew has been the personnel dispatcher for Employer for the past three years. Her duties include contacting employees to go to offshore sites, filing, terminations and communications regarding future job assignments. (Tr. 90). When an employee is sick or cannot make their shift, they contact Ms. Bartholomew. Ms. Bartholomew testified that accident reporting procedures are communicated through orientation, by the company and on the rig itself. (Tr. 91). During safety meetings on site, employees are instructed to report all accidents immediately.

Claimant never reported an injury or accident of any kind to Ms. Bartholomew, and she first became aware of Claimant's claim of injury a few months prior to the hearing. (Tr. 92, 96). Additionally, Claimant never communicated to her a desire to seek the attention of a physician or any other medical treatment. (Tr. 97).

Claimant was scheduled to return to work on August 25, 2000. On August 23, 2000, Claimant called the office and stated he would return to work as scheduled. However, Ms. Bartholomew

never heard from Claimant again.[3] She attempted to contact him several times, but her messages were never returned. On October 4, 2000, after approximately one month without hearing from Claimant, Ms. Bartholomew terminated his employment for failure to contact Employer and abandoning his work assignments. (Tr. 93-94, 96)).

Ms. Bartholomew is responsible for maintenance of all personnel files. When presented with Claimant's file she noted he had been reprimanded on May 19, 2000, for failing to check in with the answering service upon arrival at work. On August 1, 2000, he was sent in from a job site for sleeping on the job. Finally, on September 1, 2000, he was reprimanded for not showing up to his scheduled shift. (Tr. 95). Claimant's file showed no medical difficulties from his pre-employment physical, or any time thereafter. (Tr. 97).

The last time Ms. Bartholomew had any contact with Claimant was August 23, 2000, two days before he was scheduled to return to work. Additionally, in her capacity as personnel dispatcher, Ms. Bartholomew was unaware of any prior or existing complaints regarding the elevator at the location of Claimant's alleged accident. (Tr. 97).

Theresa Beard

Ms. Beard is the niece of Claimant who testified she spends much of her time with him. She noted Claimant has never had an answering machine in his home because he would not know how to operate one. Additionally, Ms. Beard testified her mother Vickie Beard, the sister of Claimant who was listed in Employer's records as his alternate contact, did not have an answering machine in August 2000. (Tr. 148-149).

The Medical Evidence

Gayden Robert, M.D.

Dr. Robert, an emergency room physician, testified by deposition on October 22, 2001. He was accepted by the parties as an expert in emergency medicine. (EX-1, p. 7). He

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[3] Claimant testified that during the week of August 21 he told Ms. Bartholomew he was injured and needed to see a doctor. Following his emergency room visit on August 25, Claimant called Ms. Bartholomew to request a health insurance claim. (Tr. 50-51). This sequence of events is more credible and logical than Ms. Bartholomew's testimony.

first examined Claimant on August 25, 2000, when Claimant visited the North Oaks Hospital emergency room.[4] Claimant complained of a pins-and-needles sensation in his right shoulder, extending down his right arm to his thumb and fingers. (EX-15, pp. 7-8). Claimant did not complain of nor mention any pain in his neck, back or legs on this visit. (EX-15, pp. 11-12).[5]

When Dr. Robert took Claimant's medical history, he denied experiencing any trauma which might have caused the pain in his shoulder and arm. (EX-15, p. 10). Dr. Robert specified he would have asked Claimant if he had been hit in the area that hurt, phrasing the question in a manner likely to be easily understood by Claimant, as he does with all of his patients. (EX-15, p. 39). Dr. Robert testified it is reasonable to assume Claimant would have told him of the alleged accident at this time, although sometimes patients do not remember an accident which caused the injury. (EX-15, p. 35).

The fact that shoulder and arm pain subsides when Claimant lifts his arm above his head, but worsens when he lowers his arm, is significant; it is common when there is obstruction blocking the nerves as they come out of the neck, according to Dr. Robert, who testified such a condition may develop from traumatic or non-traumatic causes, such as severe neck arthritis or degeneration. He did not opine as to which method is more common. (EX-15, pp. 15, 16-17). Dr. Robert, however, stated Claimant's alleged accident is consistent with his injuries, and had Claimant informed him of the accident, he would have connected the two as cause and effect. (EX-15, p. 29). Dr. Robert advised Claimant to follow-up with a neurologist, and opined he may need an MRI of his neck and EMG studies done to analyze nerve conduction. (EX-15, p. 16).

On August 27, 2001, over one year after the alleged accident, Claimant visited the emergency room again, and was examined by Dr. Robert a second time. Dr. Robert did not recognize Claimant from his previous visit, although at the time of the deposition he did have a recollection of Claimant from the second visit. (EX-15, pp. 19-20). Claimant told Dr. Robert he caught and twisted his arm in an elevator one year earlier, and has since had recurring pain in his right shoulder. (EX-15, p.

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[4] Dr. Robert has no recollection of this visit, and testified exclusively from his medical records. (EX-15, p. 50).

[5] Claimant testified he complained of neck, shoulder and arm pain at this visit, and offered no explanation for the discrepancy. (Tr. 67).

20). Claimant left out this information in his first visit, but Dr. Robert testified Claimant was an adequate history-giver who understood what was being asked of him. (EX-15, p. 50). At the August 2001 examination, Claimant complained of a deep burning behind his right shoulder which had flared up a few days prior to the visit. He did not complain of pain in his neck, arm, back, or legs. Dr. Robert was unable to diagnose Claimant's condition, but prescribed Vicodin for the pain and suggested he follow-up with an orthopedic physician. (EX-15, pp. 20-21).

Raul G. Reyes, M.D.

Dr. Reyes testified by deposition on October 26, 2001. He is a board-certified general surgeon with a specialty in orthopedic surgery. (CX-1(b), pp. 6-7). Claimant was referred to Dr. Reyes by his attorney, Mr. Matheny. Although Dr. Reyes admitted it is typically better to examine a patient directly after an accident, his initial examination of Claimant took place on September 15, 2000, approximately one month after Claimant's alleged work injury. (CX-1(b), pp. 12, 14-15).

At that time, Claimant told Dr. Reyes he was injured at work while pushing a cart with hot soup on it out of an elevator. The floor of the elevator was uneven with the rig floor onto which he was exiting. The cart tipped, and he burned his hands while attempting to catch the pot of soup. As he tried to stabilize the pot and pick up the lid, the elevator doors closed on him, striking him in the back and right shoulder blade. (CX-1(b), pp. 16-17). Claimant informed Dr. Reyes he saw a medic the day following the accident, but he did not seek additional help right away because he thought his pain and discomfort would eventually subside.

Upon examination, Claimant complained of difficulty sleeping, problems with his neck, aching in his right shoulder, periodic spasm in his neck and shoulder, and numbness/tingling in his right hand, especially his fingers. Additionally, Claimant experienced pain in his lower back from time to time. (CX-1(b), p. 21). Dr. Reyes did not find any evidence of burns on Claimant's hands. (CX-1(b), p. 17). Initially, there were no outward signs of injury, however, examination of the cervical spine showed paresthesias of the right upper extremity which Dr. Reyes believed to be the cause of the tingling sensation of which Claimant complained. (CX-1(b), pp. 21-22).

Claimant had moderate stiffness and restricted range of motion in his neck. No bruising, swelling, deformity, burns, cuts or inflammation were visible. (CX-1(b), pp. 23-24). In Dr. Reyes' opinion, the temporary nature of all spasm, and the fact

that he did not observe tightness in Claimant's back at the time of examination, does not preclude the existence of spasm in Claimant's back. (CX-1(b), pp. 25-26).

Dr. Reyes further testified despite the absence of objective visual injuries, people often have medical problems that cannot be objectively observed. Such injuries are diagnosed subjectively, with eighty-five percent of the diagnosis based on the patient's medical history and complaints. From his own observations, Dr. Reyes found Claimant's assertions about his physical condition to be credible. (CX-1(b), p. 29).

Dr. Reyes diagnosed the tingling and numbness in Claimant's upper right extremity as paresthesias. In an initial evaluation like this one, a doctor relies solely on a patient's complaints to make this diagnosis, however, follow-up testing, such as an MRI, CAT scan or EMG study, is used to confirm and evaluate the patient's conditions, according to Dr. Reyes. (CX-1(b), pp. 30-31).

Dr. Reyes also diagnosed Claimant with a cervical spine sprain, a lumbosacral spine sprain, a right shoulder sprain and credible complaints of right upper extremity paresthesias. He continued to see Claimant every two weeks, and recommended physical therapy consisting of diathermy, steam packs and massage to the back and neck. Dr. Reyes prescribed Claimant medicines for pain and to help him sleep. (CX-1(b), p. 33). On December 7, 2000, Dr. Reyes took an MRI of Claimant's lumbosacral spine. The results indicated a bulging disk at the L4-5 level with three millimeters of posterior extension, as well as a central right-sided disk herniation at the L5-S1 levels, although there was no evidence of pressure on any of the nerve roots. (CX-1(b), pp. 45, 49-51). Dr. Reyes testified Claimant's back injuries could be the result of disk degeneration, but generally a traumatic event is at the root of such problems. To be positive that Claimant's back condition is not the result of a prior injury, Dr. Reyes stated an MRI would be needed prior to each trauma event. (CX-1(b), pp. 55-57).

Dr. Reyes found Claimant to be temporarily totally disabled as of his first visit in September 2001. Dr. Reyes opined Claimant has not been able to return to work since he started treating him. According to Dr. Reyes, Claimant has not reached maximum medical improvement and needs further medical treatment. (CX-1(b), p. 83). He testified he could not help Claimant, but would defer to the opinions of two orthopedic surgeons and one neurosurgeon. (CX-1(b), p. 84).

Robert T. McAffee, M.D.

Dr. McAffee, an orthopedic physician, testified by deposition on October 11, 2001. He examined Claimant on June 3, 1997, for neck injuries sustained when he tripped and fell while carrying bookshelves at work. Claimant complained of neck pain and occasional numbness to the right shoulder. (EX-16, pp. 6-7). Dr. McAffee diagnosed Claimant with a cervical strain, advised him to do exercises, and excused him from work for one month. (EX-16, pp. 9-10).

Dr. McAffee followed Claimant's injury progress over the following six months. In August 1997, the pain had worsened, and Dr. McAffee prescribed physical therapy and restricted Claimant's work duty to mild lifting. (EX-16, p. 13). At his last visit on November 18, 1997, Claimant indicated he still had some mild pain, but it had greatly improved and was something he could live with. Dr. McAffee thought the injury and symptoms had resolved, and stopped following Claimant at this time. (EX-16, pp. 17, 22). X-rays of Claimant's cervical spine were normal, as were the range of motion in his neck and neurological examination of his upper extremities. Dr. McAffee opined the pain was muscular in origin. At no time during his treatment of Claimant did Dr. McAffee conduct any CAT scans or MRI tests, although he testified to the possibility that Claimant's injury could turn out to be something more serious, such as a disk injury. (EX-16, pp. 15, 17-18).

Claimant returned to Dr. McAffee's office on February 12, 2001, for his Social Security Administration disability determination and was examined by Dr. McAffee's associate, Dr. Flambough. (EX-16, p. 19). As part of his medical history, Claimant told Dr. Flambough of his alleged accident on August 16, 2000, and that he had started having pain in his shoulder and chest on August 17, 2000. (EX-16, pp. 19-20).

On this visit, Claimant complained of pain around the right shoulder, the upper quadrant of his body and the anterior chest. He also reported he had numbness and pain in his fingers, but it had subsided. (EX-16, p. 19). Dr. McAffee testified that, although the same shoulder was involved in each incidence, the injuries were not necessarily the same. (EX-16, p. 22). He also testified he would defer to Claimant's treating physician, Dr. Reyes, for any opinion as to Claimant's current physical condition. (EX-16, p. 21).

Joe Almond Morgan, M.D.

Dr. Morgan, an orthopedic surgeon, testified by deposition on November 28, 2001. He was accepted by the parties as an expert in orthopedic surgery. (EX-11, p. 5). Dr. Morgan was

hired by Carrier to conduct a physical examination of Claimant, which took place on July 2, 2001. Claimant provided Dr. Morgan with his medical history, including the details of the alleged accident and the doctors he has since visited. (EX-11, pp. 30, 6-7). Claimant informed Dr. Morgan that his symptoms included pain in his right shoulder and back, numbing of the legs and right arm, swelling of the feet and occasionally his legs would jump. He reported he was taking Vicodin for pain. Dr. Morgan felt Claimant was an adequate history-giver who was able to understand the questions asked of him. (EX-11, pp. 7, 9).

Dr. Morgan conducted a physical examination of Claimant and did not find any abnormalities. Specifically, Claimant had full range of motion in all of his upper and lower extremities, there was no tenderness of the spine and reflexes and muscles all appeared normal. (EX-11, pp. 10, 12). There was no nerve involvement in the upper or lower extremities, and a Babinski test indicated that the brain and spinal cord activity were normal. Dr. Morgan found no orthopedic or neurologic abnormalities in Claimant's spine or extremities, but he suggested a myelogram and CT scan of Claimant's back before conducting any surgery. (EX-11, pp. 13-14, 23).

X-rays taken by Dr. Morgan showed spur formations of Claimant's cervical spine, lower thoracic spine and lumbar spine, indicating an arthritic process in those locations which had been occurring for at least several years. Dr. Morgan testified this is a normal, degenerative condition. (EX-11, pp. 16-17). Dr. Morgan also conducted MRI tests, with findings in the lumbar spine and evidence of impingement syndrome in the right shoulder. These findings were inconsistent with the physical examination, which was normal. Dr. Morgan, however, placed more credence on the examination than the MRI findings, and testified radiologists often require the two to be correlated. (EX-11, pp. 23-25). Absent any physical examination abnormalities, Dr. Morgan considered the MRI findings to be degenerative in nature.

Dr. Morgan also performed a hand grip test on Claimant, which he used as a measure for the validity and sincerity of Claimant's complaints. The test consisted of five different grips which were measured in pounds by the forcefulness of Claimant's grip. (EX-11, p. 17). Results of a healthy person form a bell shaped curve. Results of Claimant's test, however, formed a flat curve, indicating to Dr. Morgan that Claimant put forth minimal effort and basically did not try. Dr. Morgan testified this test is subjective in nature, but well-recognized in the field of hand surgery. (EX-11, pp. 18-20).

Dr. Morgan found Claimant to be at maximum medical

improvement, not in need of surgery, and with no work-related disability or impairment. (EX-11; 26-28).

Brian G. Murphy, Ph.D.

Dr. Murphy, a psychologist, testified by deposition on January 14, 2002. He has been practicing psychology in the private sector since 1984, limiting his practice solely to diagnostic testing and psychological evaluations. He is currently the director of the Psychology Department at Charity Hospital of Bogalusa, LA. (CX-1(f), pp. 5-6). Additionally, he has been employed to do psychological evaluations for the office of community services, child custody evaluations and disability evaluations for the Social Security Administration. (CX-1(f), p. 6). Dr. Murphy occasionally does evaluations for vocational rehabilitation agencies, however he is not a licensed vocational rehabilitation counselor. (CX-1(f), p. 8). The authority to do generic types of evaluations such as determining a patient's mental status, competency and potential is inclusive of being a psychologist. (CX-1(f), p. 8-9).

Dr. Murphy administered specific testing to Claimant on April 26, 2001, at the request of the Disability Determination Services of the Social Security Administration. (CX-1(f), p. 10). Dr. Murphy performed a mental status examination, an intellectual test and an adaptive behavior assessment. (CX-1(f), pp. 11-12). Dr. Murphy met with Claimant one time for approximately one and one-half hours. Claimant drove himself to Dr. Murphy's office. (CX-1(f), p. 37). According to Dr. Murphy, Claimant seemed cooperative and credible, with no intent to deceive. (CX-1(f), p. 51; CX-2, p. 2). After testing, Dr. Murphy provided a written report including his interpretations of the data and any diagnostic impressions. The Social Security Administration did not ask him to make a determination whether Claimant could "pursue meaningful work activity and gainful employment," and was expressly cautioned against doing so. (CX-1(f), pp. 17, 18).

The only medical records Dr. Murphy reviewed in connection with Claimant were the report of Dr. Flambough and the MRI report of Dr. Mask. (CX-1(f), pp. 20-21). Dr. Murphy does not typically rely on doctors' medical opinions before making his own objective determinations. Often, as in the present case, the additional doctors' reports have little or no direct relation to the individual's psychological evaluation. (CX-1(f), p. 46).

Dr. Murphy conducted several tests related to Claimant's intellectual and functional capacity. (CX-1(f), p. 23). A Wechsler Adult Intelligence Scale, Third Edition (WAIS-3), was

performed to determine his IQ. An adaptive behavior inventory called The Scales of Independent Behavior, Revised Version, was also performed to determine Claimant's functional capacity. (CX-1(f), p. 23).

The WAIS-3 test provides three types of IQ scores. First, a verbal skills score determines how the left side of the brain is functioning. Second, an individual's performance IQ tests the right side of the brain which controls organizational, perceptual and spatial-aptitude abilities. Both of these criteria are generated from five sub-tests. Finally, a combination of the two previously mentioned scores yield a total evaluation of how well Claimant performed in relation to other individuals his age. (CX-1(f), pp. 24-25). The three scores are often useful in determining a person's success in future endeavors. (CX-1(f), p. 26).

Claimant scored a 75 on the performance and verbal aspects of the WAIS-3 test, placing him in the fifth percentile. This indicates that out of those who took the test, his skills were comparable to the lower five percent of his age group. Claimant had a full scale IQ of 73, which placed him in the fourth percentile of individuals his age. These are borderline scores between mild mental retardation and low average intelligence. (CX-1(f), pp. 30-31). Dr. Murphy explained a person who had a score of 59 or below on the WAIS-3 test would be considered mentally retarded by the Social Security Administration, and, by their standards, would be considered per se disabled. A person like Claimant, however, who scored in the borderline range, would typically have to show some kind of secondary handicap to be considered disabled. (CX-1(f), pp. 32-33).

Nevertheless, scores as low as Claimant's do not usually occur without reason. Low IQ scores are either a product of socio-cultural factors, neurological dysfunctions or a combination of the two. Dr. Murphy opined Claimant's low IQ score was likely due to a neurological abnormality. In his opinion, Claimant has always had these conditions and, because there was no evidence of trauma to Claimant's head, it was unlikely his work injury aggravated his neurological problems. (CX-1(f), p. 34).

The Scales of Independent Behavior, Revised Version, is primarily based on what the patient tells the doctor he can or cannot do, assuming the patient is honest. (CX-1(f), p. 27). Claimant's results were in the first percentile for all domains tested. Adaptive behavior assessment results are usually higher than IQ testing, and Dr. Murphy concluded Claimant's physical problems at the time of testing caused this decline. (CX-1(f),

p. 35). Dr. Murphy noted Claimant complained of back pain during his examination. Moreover, according to Dr. Murphy, Claimant appeared to be suffering from actual authentic pain. (CX-2, p. 2).

Dr. Murphy's overall impression of Claimant's functional capacity was that Claimant had probably always been a slow learner with academic difficulties in school. He opined that even if Claimant had been at his very best it was unlikely his IQ score would increase by more than a few points. A man with Claimant's intellectual abilities is functioning at a fifteen or sixteen-year-old level, rather than that of a fully mature adult. According to Dr. Murphy, an individual at this level could possibly have difficulties when asked about a prior medical history or injury. (CX-1(f), pp. 58-59; CX-2, p. 2). For example, there is about a sixty percent chance Claimant would understand the word "trauma," if asked. (CX-1(f), p. 60).

With regard to his adaptive behavior, Dr. Murphy expected Claimant to obtain results consistent with his lower/borderline intelligence level. However, test results indicated Claimant was functioning at a mentally retarded level at the time of examination. Dr. Murphy believed Claimant would have performed considerably higher on these tests but for the injuries Claimant had previously sustained. (CX-1(f), pp. 38-39).

Dr. Murphy was not surprised that a man with Claimant's intellectual abilities had been able to maintain consistent employment for numerous years. He did not feel Claimant's intellectual abilities necessarily precluded him from finding employment. However, due to his intellectual problems, Claimant would certainly be at a competitive disadvantage in seeking employment in the marketplace. (CX-1(f), p. 56; CX-2, p. 2).

The Vocational Evidence

Angeliki Kampitsis

Ms. Kampitsis is a licensed rehabilitation counselor in Louisiana and certified by the Department of Labor. I have accepted Ms. Kampitsis as an expert in the field of vocational rehabilitation counseling. (Tr. 116-118).

Ms. Kampitsis was asked to generate a vocational evaluation with regard to Claimant, based on a meeting with Claimant, Claimant's deposition, employment records and medical reports. (Tr. 118).

Ms. Kampitsis met with Claimant on January 24, 2002, at

which time she gathered general information about his condition and physical limitations, and conducted "the Woodcock-Johnson Tests of Achievement, Revised." Through the interview and tests, Ms. Kampitsis discovered Claimant claimed to have injured his neck, back and shoulder at work, but he felt his neck and shoulder condition had improved approximately ninety-nine percent. (Tr. 119). His main complaints at the evaluation were from his lower back, as well as pain in both legs resulting from his back injury. Claimant asserted he has difficulty standing in a stationary position for more than ten minutes, climbing stairs, reaching, stooping, bending, kneeling and lifting in excess of ten pounds. He also told Ms. Kampitsis he once had problems with his grip strength, but not anymore. He reported his left leg throws him off balance when walking, and he suffers from spasm in his legs and lower back, resulting in cramping. (EX-23, pp. 3-4).

According to the tests administered, Claimant is a functional illiterate. He reads at the second grade level, and would thus have difficulty reading simple documents and completing simple forms. (Tr. 120). Claimant would likely need assistance completing job applications, but does have basic math skills required to count money and make change. Ms. Kampitsis testified Claimant would be able to perform the duties of a toll-taker or parking garage attendant, but not something more complex such as operating a credit-card machine. Additionally, he could be trained to complete simple logs or charts if they were repetitive in nature. Ms. Kampitsis was optimistic concerning the possibility of finding employment for Claimant. (Tr. 121).

Ms. Kampitsis reviewed Claimant's medical reports in which Dr. Reyes, Claimant's treating physician, opined Claimant has not yet reached MMI, but Dr. Morgan found Claimant was not in need of any further treatment and could return to work without restriction. Dr. Murphy, a psychologist, found Claimant to have a borderline IQ of 73 and opined Claimant was an overall slow learner. (Tr. 122).

Additionally, Ms. Kampitsis conducted a transferable skills analysis. She found Claimant to have transferable skills. Using this data, Ms. Kampitsis performed a labor market survey. Using research done at the Bureau of Labor and Statistics, she attempted to identify the average wages of employees with similar transferable skills. (Tr. 123) Ms. Kampitsis contacted all of the potential employers in her labor market survey to determine the duties of such jobs and if jobs were available. (Tr. 124).

Based on Dr. Morgan's opinion that Claimant had reached MMI and was capable of returning to his regular work duties, Ms.

Kampitsis located several jobs as a galley hand. These positions had an annual salary between $19,106.50 and $23,744. Ms. Kampitsis also identified a number of custodial positions, including one in Jefferson Parish paying $10,718 per year. (Tr. 125).

Ms. Kampitsis' interpretation of Dr. Reyes' opinion regarding Claimant's condition was that Claimant has not yet reached MMI and is unable to work at this time. (Tr. 127). She was also aware of an MRI showing Claimant had a bulge at the L4-5 level and a central right-sided herniated disk at the L5-S1 level. (Tr. 131). Nevertheless, Ms. Kampitsis identified employment opportunities assuming Claimant had reached MMI and was restricted to light, medium-light or sedentary work. (Tr. 126). Taking into account Claimant's age, education and work experience, jobs were found at each of the work restriction levels mentioned above. (Tr. 127).

Ms. Kampitsis has been successful in the past finding employment for individuals with similar educational and physical characteristics as Claimant. All of the jobs identified in her reports were located within a fifty-mile radius of Claimant's local community. (Tr. 130,123). She was confident that even if Claimant were to be restricted to light or sedentary work, there were jobs highlighted by her labor market survey Claimant would be able to perform. (Tr. 130).

Ms. Kampitsis specifically discussed positions as a personal care assistant and a direct care worker at Horizon House Shelter. The positions were described by the employer as similar to a "sitter" job where the employee watches over another person who is usually mentally retarded or a minor, and at times may assist the person with independent daily living skills. (Tr. 133). These jobs pay $5.15 and $6.00 per hour, and are considered sedentary. Physical demands do not include bending, stooping, squatting or crawling, however, reaching, handling and fingering are done occasionally, as is light lifting of under five pounds. (EX-23, pp. 26-27). After Ms. Kampitsis informed the employers about Claimant's intellectual and physical capabilities, they still agreed to consider him for the position. (Tr. 134).

A trainer position at Strawberry Fields, a home for the mentally ill, was also identified. This job fell under the light category of work, and would involve occasional bending, stooping and lifting of up to twenty pounds. Ms. Kampitsis again asserted there was no educational requirements for these types of positions. Moreover, if provided with the proper training and instructions, Claimant could learn to assist the individuals.

(Tr. 136-137).

With regard to the security guard positions at Inter-Parish Security in Hammond and Vinson Guard Service in Lacombe, both jobs required walking or standing seventy percent of the time.

The Contentions of the Parties

Claimant contends he suffered injuries to his back, neck and shoulders, as well as burns on his hands, at work on August 16, 2000. He argues his testimony regarding the details of the accident and injury, along with the respective corroboration of witnesses, sufficiently establishes a **prima facie** case linking his accident to his injuries, which Employer/Carrier have failed to refute. Claimant asserts Employer/Carrier can show no prejudice sufficient to complain of the timeliness of the notice. Claimant also contends his lack of malingering and eagerness to return to work bolster his credibility and the truthfulness of his testimony. He maintains he is temporarily totally disabled, and his termination by Employer was in bad faith. Claimant prays for recognition of the merits of his claim, and Employer/Carrier's immediate payment of same.

Employer/Carrier argue Claimant is an unreliable and incredulous witness. They contend Claimant's complaints are inconsistent and vague, and the medical evidence contradicts any causal link between Claimant's alleged accident and his injuries. Furthermore, Employer/Carrier contend that the fact of accident and injury was not corroborated by any witness, therefore Claimant failed to establish a **prima facie** claim of injury. In the alternative, Employer/Carrier argue that Claimant's two-month delay in reporting his injury prejudiced Employer/Carrier, depriving them of an effective investigation.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries,

512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

In the case at hand, Claimant asserts he had an accident at work on August 16, 2000, whereby in an attempt to catch a falling pot of soup, his body was caught and twisted in an elevator which resulted in injury to his arm, shoulder and back. He claims everyone in the kitchen knew of his accident and injuries, and that he reported his injury to his supervisor, but was told not to fill out an injury report. The next day when he reported to the medic, Mr. Swanson, that his arm felt numb, Mr. Swanson told him he probably just slept on his arm wrong. Within one week, Claimant sought treatment from the emergency room, where Dr. Robert concluded Claimant suffered from cervical stenosis, or nerve obstruction in the neck. On September 15, 2000, Claimant was treated by an orthopedic surgeon, Dr. Reyes, who diagnosed him with sprains in his cervical spine, lumbosacral spine and right shoulder, as well as credible complaints of right upper extremity paresthesias. It is Claimant's position that these injuries are the direct result of his August 16th accident.

Employer/Carrier maintain the position that Claimant's accident never occurred, and even if it did, it did not result in the aforementioned injuries. Employer/Carrier rely heavily on the fact that there is no report of Claimant's accident or injury, as is required by company policy. They also produce testimony indicating none of the fact witnesses actually saw the accident or were told by Claimant he suffered injury therefrom. Employer/Carrier also contend if Claimant truly sustained an accident and injury, it should have been recorded in Mr. Swanson's medic log, as well as the emergency room physician's report. The evidence indicates Claimant told neither of these treating sources about his accident, thereby disproving any causal connection between the accident and injury. For these reasons, it is Employer/Carrier's position that Claimant has failed to establish a prima facie claim.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant has established sufficient evidence to invoke the Section 20(a) presumption. Medical evidence shows Claimant sustained neurological injury to his right shoulder, arm and lower back. Claimant first complained about these injuries the day after his accident, and has since seen several doctors for treatment. The testimonial evidence of fact witnesses corroborates the occurrence of Claimant's accident

or “incident” on August 16, 2000, and working conditions involving a gap between the floor and the elevator which could have caused the incident resulting in the alleged harm or pain. Furthermore, the medical evidence establishes that Claimant credibly suffers from reported pain, which could be the result of trauma sustained in the accident.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established he suffered a harm or pain on August 16, 2000, and his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer’s Rebuttal Evidence

Once claimant’s **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that claimant’s condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant’s employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of, or contribution to, a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, employer must establish that claimant’s work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which

aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

In the instant case, Employer/Carrier have presented substantial countervailing evidence to rebut the presumption that Claimant's employment caused, contributed to or aggravated his condition.

Employer/Carrier presented the medical records and testimony of Dr. Morgan, as well as that of other fact witnesses, to rebut the Section 20(a) presumption. After reviewing MRIs, conducting a physical examination, and taking X-rays, Dr. Morgan was of the opinion, to a reasonable medical probability, Claimant's condition is attributable to the degenerative changes that occur naturally in the aging process. Mr. Swanson provided evidence establishing Claimant never reported his injury to him or the executive steward, as required by company policy, and co-workers testified Claimant completed his hitch without complaint of injury or difficulty completing his work. Numerous fact witnesses also denied knowing of any injury to Claimant, directly contradicting Claimant's testimony. Dr. Robert testified that on Claimant's visit to the emergency room, Claimant did not mention the accident when asked what caused his pain. Because Employer/Carrier have presented substantial countervailing evidence through Dr. Morgan's opinion and the testimony of fact witnesses to rebut the presumption that Claimant's employment caused, contributed to or aggravated his condition, Employer/Carrier have met their burden in rebutting the Section 20(a) presumption.

3. Weighing All Of The Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Initially, Employer/Carrier argue Claimant's testimony is inconsistent and unreliable, and they presented various fact witnesses to contradict his testimony and attack his credibility. Claimant asserts he called for Mr. McGee to help him with the

soup mess, and that Mr. McGee saw the gap between the elevator and the floor. Claimant also testified that when they returned to the kitchen, Mr. McGee saw the burns on Claimant's hands and told Claimant to put some cream on them. Although Mr. McGee testified he did help clean up the mess, he further testified he did not hear Claimant call for him, nor did Claimant point out the gap between the elevator and the floor. Likewise, Mr. McGee did not see Claimant's burns or tell him to put cream on them. He testified while there is supposed to be a first aid kit in the kitchen, everyone always goes to the medic for burn cream.

Claimant also testified everyone in the kitchen knew of the accident and saw his burns, and he specifically showed his hand burns to Mr. Nicholson and Mr. Eugene. Mr. Eugene testified he only knew of the accident because he had to dish out more soup, not because Claimant told him, and he never saw Claimant's burns. Mr. Nicholson did not testify, but a statement he provided to Employer has been submitted into evidence. In that statement, Mr. Nicholson asserted Claimant told him about the accident and the wheels of the cart catching in the elevator tracks, but did not tell him he was hurt in any way. The statement mentions nothing of Claimant's burns. Mr. Thomas, who was in the kitchen on August 16, 2000, also testified he did not see Claimant's burns, or know of any injury Claimant sustained while on the Shell Auger.

Claimant could offer no explanation for the discrepancy between his testimony and that of Mr. McGee, Mr. Eugene, and Mr. Thomas. Claimant changed the details of his story on direct and cross-examination, but at all times maintained the position that these gentlemen knew of the accident and saw his burns. Employer rewards its employees when they have fewer accidents, and Claimant argues these witnesses were trying to maintain their perfect record of no accidents by covering this incident up, and denying the existence Claimant's injuries. That, however, is insufficient evidence to overcome Claimant's faulty testimony, and I find Claimant was not being completely truthful in his recollection of the events of August 16, 2000.

Employer/Carrier emphasize if Claimant had an accident or injury, it should have been written up and reported immediately. All of the witnesses who were employees of Employer described the procedure for reporting incidents which is to go to the immediate supervisor, then the executive steward, the Shell supervisor, and finally the medic. At the time of the accident, Mr. Nicholson was executive steward, Mr. Eugene was relief executive steward, and Mr. Thomas was third in command as head cook. The evidence shows Mr. Nicholson and Mr. Eugene were aware of Claimant's accident. It also shows Employer's company policy is to report

all accidents **or** injuries, no matter how small. Ms. Marney, Employer's general manager, testified Employer investigates every reported incident, and often Shell will investigate even if an accident could have happened. She also testified, along with the rest of the employee-witnesses, that this procedure is detailed in the employee handbook and manual, and emphasized at daily and weekly safety meetings. In addition to the written report, a senior person in charge is to telephone her directly regarding any incidents.

The evidence is unclear as to who is supposed to complete the written report - whether it should be the injured employee or the supervisors. Claimant reported his accident to his executive steward, as required by company policy, who, apparently, should have then reported it to the Employer. I find it reasonable to believe Claimant was under the impression he did all he had to do as far as reporting his accident and injuries to the Employer, and Employer/Carrier's argument to the contrary is not sufficient to disprove the occurrence of the accident/injury.

Employer/Carrier also rely on the fact that Claimant's injuries were not recorded in Mr. Swanson's medic log, thus disproving any causation between his accident and injuries. Claimant testified he visited Mr. Swanson on August 17, 2000, about numbness and throbbing in his right arm and neck. He told Mr. Swanson it felt like he slept on his arm and neck wrong, and testified Mr. Swanson replied it was probably just that. Mr. Swanson testified when men come to him with such symptoms and seek an opinion, but not treatment, as Claimant had, he probably would not write it up in his log. He further stated he had told other employees similar things without recording them in his log. Claimant did not visit the medic again because he finished his hitch on the rig, and flew to shore the next morning. I, therefore, find Claimant was truthful in his testimony regarding his visit to Mr. Swanson, and Employer/Carrier have failed to prove the absence of a log entry contradicts his testimony.

There is confusion and conflict of testimony regarding what happened after Claimant left the rig on August 18, 2000. Claimant testified he was to report back to work one week later, on August 25, but instead he went to the emergency room, explaining he waited in hopes his pain would go away. He asserted prior to that date he had several conversations with co-employees of the Employer, testifying "there were several times where I called and they called." Specifically, he stated he had talked to Mr. Nicholson and Mr. Eugene, who each asked him if and when he would be returning to work. Claimant told them he was injured and could not work. Mr. Eugene, Mr. Thomas, and Mr. McGee, however, testified they did not talk to Claimant after he

left, or try to contact him while he was at home. Mr. Thomas did state that Mr. Nicholson attempted to contact Claimant at home, but was unsuccessful. They all testified they did not know of Claimant's injuries or present claims until his lawyer called the rig a few weeks after the accident occurred. Claimant could offer no explanation for this discrepancy, and I thus find his testimony regarding this matter was not truthful.

Claimant also testified Ms. Bartholomew, as well as another lady named "Dee" and yet another unidentified lady, called him the week of August 20. Claimant told them he was hurt, and he had to go to the doctor to find out what was wrong with him. Claimant also testified that during the week of August 28, after he visited the emergency room, he talked to Ms. Bartholomew about filing a health insurance claim to see a neurologist. At that time she informed him that, as far as she was concerned, he did not have a job anymore. Claimant then retained counsel, under the belief he was wrongfully terminated.

Employer/Carrier presented the testimony of Ms. Bartholomew, who asserted she only had one conversation with Claimant, and that was on Wednesday, August 23, where he told her he would report to work that Friday. Ms. Bartholomew is the person employees report to if they are too sick to go to work, and she claimed she never received any notice from Claimant that he was not able to work. Ms. Bartholomew testified that after he did not report for work as scheduled, she repeatedly attempted to contact Claimant, and even left messages on his answering machine, but he never responded. She claimed she never talked to Claimant about health insurance claims, nor told him he was fired. Ms. Bartholomew testified she did not terminate Claimant until October 4, 2000, for abandoning his work duties. Her testimony, however, is inconsistent with the evidence which clearly establishes Claimant and his sister, his second source of contact, have never owned an answering machine, and, more importantly, that Claimant hired an attorney prior to October 4 under the belief he was wrongfully terminated. It is unreasonable to presume Claimant would have retained counsel unless he thought he was being terminated because he was injured and unable to work. I therefore find Claimant's testimony regarding this matter is credible.

Employer/Carrier further argue Claimant's failure to report his accident to Dr. Robert, and his delay in seeking treatment from Dr. Reyes, indicate there is no causal relationship between the accident and the injury. They also rely on the report of Dr. Morgan, who examined Claimant and found him to be at maximum medical improvement with no work related disabilities or restrictions.

Dr. Robert treated Claimant at North Oaks Medical Hospital's emergency room on August 25, 2000. He testified Claimant told him he had not suffered any recent trauma which could have caused his pain. It is Claimant's contention he was never asked about the cause of his pain, and it is argued that if he was, Claimant would not have understood what was being asked of him. Dr. Robert, however, maintained this was a routine question he asked all of his patients, and he tailors the question to each patient's apparent level of understanding. Dr. Robert testified he would have asked Claimant if he hit the area of his body that hurt, or something similar.

Dr. Robert further testified, as did subsequent doctors who examined Claimant, Claimant was a good history-giver who understood the questions asked of him. He also stated an accident of this type would be something about which most patients would tell him, although he admitted occasionally patients forget the accidents which caused their injuries. Claimant offered no explanation for this discrepancy, other than he did not recall Dr. Robert asking him about his medical history. Moreover, Dr. Murphy testified, based on his psychological examination, Claimant's intellectual level could possibly cause him to have difficulties when asked about a prior medical history or injury.

Dr. Reyes first examined Claimant on September 15, 2000, nearly one month after the accident occurred. Claimant explained the delay was due to his lack of funds. This testimony is consistent with his assertion that after visiting the emergency room he talked to Ms. Bartholomew about making a health insurance claim, but was denied. I also note Claimant's lawyer recommended him to Dr. Reyes, and paid for such visits. Dr. Reyes testified it is easier to make a causal connection between an accident and an injury if the patient is examined sooner rather than later. He stated he did not know what Claimant's condition was in the interim. He relied solely on the history Claimant gave him in reaching his opinion that there were no intervening incidents between the accident on August 16, 2000, and his first examination of Claimant one month later. He found Claimant to be a credible and satisfactory history-giver.

Dr. Reyes and Dr. Robert respectively testified that in their medical opinions, Claimant's symptoms rarely occur absent trauma, and are consistent with his accident. I find the medical testimony of Drs. Robert and Reyes establishes a causal connection between Claimant's accident and his injury. There is no evidence of an intervening trauma or accident.

4. Conclusion

In light of the medical and testimonial evidence, I find Claimant has met his burden of establishing that he suffered harm at work on August 16, 2000, which caused the injuries to his neck, right shoulder and arm, back, and lower extremities.

I find Claimant's co-workers did not know of Claimant's injuries at the time the accident occurred, nor did they talk with Claimant by telephone during the week after the accident. I further find Claimant had an accident August 16, 2000, which he reported to his supervisor, and presented to the medic the following day regarding numbness in his shoulder and arm. I also find that after his emergency room visit, Claimant talked with Ms. Bartholomew who impressed on him the fact that he no longer worked for Employer, thus prompting Claimant to retain counsel.

In considering the credibility of Claimant's testimony, it is necessary to also consider his mental capabilities. I find the portions of his testimony which I considered to be inconsistent were the result of innocent confusion, and not intentional deception. More importantly, they do not combine to render the entirety of Claimant's testimony incredulous. My conclusion is buttressed by the opinions of Drs. Murphy and Reyes, whose respective testimony indicate a causal relationship between his accident and injuries. Whether Claimant's injuries are new, or simply an aggravation of a preexisting condition, I find they are nonetheless compensable.

B. Section 12 Notice

Employer/Carrier argue there is no valid claim because they were not given notice of an accident or injury until more than thirty days after the date of the alleged incident.

Section 12(a) of the Act provides that notice of an injury for which compensation is payable must be given within thirty days after injury, or within thirty days after the employee is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury and the employment. Kashuba v. Legion Ins. Co., 139 F.3d 1273, 1275-76, 32 BRBS 62 (CRT) (9th Cir. 1998), cert. denied 525 U.S. 1102 (1999); Bivens v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 1 (1985), on recon., 18 BRBS 151 (1986).

Under Section 20(b) of the Act, it is presumed that sufficient notice of a claim has been given, absent substantial

evidence to the contrary. 33 U.S.C. § 920(b); see Kashuba, supra. Therefore, the burden is on the employer to establish by substantial evidence that it was prejudiced by the claimant's failure to give timely notice of the injury. See Kashuba, supra; Bivens, supra. In the present case Claimant distinguishes Kashuba, pointing out that the claimant in Kashuba reported the accident four months after it allegedly occurred, and after he had undergone surgery for the injuries. Claimant here emphasizes he reported his accident and injuries only two months later because he could not afford the necessary medical treatment, thus reliance on Kashuba is inapposite. Prejudice under Section 12(d)(2) is established when the employer provides substantial evidence that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the injury or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. Bustillo v. Southwest Marine, Inc., 33 BRBS 15, 16-17 (1999); ITO Corp. v. Director, OWCP [Aples], 883 F.2d 422, 424, 22 BRBS 126 (CRT) (5th Cir. 1989).

In the instant case, Claimant contends he was injured on August 16, 2000, after getting caught in the elevator doors at work. He did not file his claim for worker's compensation until October 23, 2000, more than two months after his alleged work accident. Employer/Carrier argue they were prejudiced by Claimant's failure to provide notice of an alleged work-related injury for sixty days. Employer/Carrier assert had Claimant timely reported the accident, an accident report would have been immediately completed and an investigation performed. Because of the two-month delay, Employer/Carrier contend they were not able to effectively investigate the alleged accident. Specifically, Ms. Marney testified Employer has a ninety percent turnover rate, and she was unable to locate people who worked with Claimant the day of the alleged incident. Employer/Carrier also argue Claimant's delay in seeking medical attention rendered it difficult to establish a causal relationship and rule out intervening trauma. They also assert this delay caused a further postponement in Claimant seeing their orthopedic specialist.

Claimant stipulates his claim was not filed, and Employer/Carrier did not receive notice thereof, until October 23, 2000, more than thirty days after the date of the accident. However, Claimant contends this delay did not prejudice Employer/Carrier, nor hamper their investigation in any way. Claimant further asserts he sought medical treatment the week following the incident, but the follow-up treatment with Dr. Reyes was delayed due to Employer's failure to provide health

insurance. Finally, Employer/Carrier knew of the claim on October 23, 2000, but did not arrange for Dr. Morgan to examine Claimant until July 2, 2001.

I find Employer/Carrier were not prejudiced by Claimant's two-month delay in filing his claim for worker's compensation benefits and are, therefore, precluded from utilizing Section 12(a) of the Act as a defense. At least five co-workers of Claimant were contacted immediately after the claim was filed, and four of them provided deposition testimony in this matter. It is not evident how Claimant's delay in bringing his claim resulted in a further delay of Dr. Morgan's examination. Dr. Morgan was able to render a complete and thorough examination of Claimant. Additionally, Employer/Carrier were not prejudiced by Claimant's delay in seeking medical treatment for his injuries, as Claimant was placed in the same position from which to prove causation. Therefore, I find this argument is without merit. Accordingly, I find Employer/Carrier were not prejudiced by Claimant's two-month delay in filing his claim for worker's compensation benefits or providing timely notice under Section 12 of the Act.

C. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or

indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v.

Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The medical reports of one hospital emergency department, one orthopedic physician, and two orthopedic surgeons have been submitted in this matter. The emergency room physician and the orthopedic physician rendered no opinion as to Claimant's ability to perform his former job. The orthopedic physician specifically stated he would defer to Claimant's treating physician on the subject. Employer/Carrier contend the testimony of Dr. Morgan should be accorded greater weight than the opinion of Dr. Reyes for the sole reason that Dr. Morgan is board-certified in orthopedic surgery, while Dr. Reyes is not.

"[The Fifth Circuit Court of Appeals] has repeatedly held that ordinarily the opinions, diagnoses and medical evidence of a treating physician who is familiar with the claimant's injuries, treatment, and responses should be accorded considerable weight in determining disability." Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000) (citing Scott v. Heckler, 770 F.2d 482, 485 (5th Cir. 1985); Barajas v. Heckler, 738 F.2d 641, 644 (5th Cir. 1984); Smith v. Schweiker, 646 F.2d 1075, 1081 (5th Cir. 1981); Fruge v. Harris, 631 F.2d 1244, 1246 (5th Cir. 1980)).

I note Dr. Morgan was the choice of physician for Employer/Carrier, and he examined Claimant on only one occasion. I also note that while Dr. Reyes is not board-certified in orthopedic surgery, he is board-certified in general surgery and has had nearly fifty years of extensive experience in traumatic orthopedic surgery, rendering him a specialist in that field of medicine. (See CX-1(b)). Most importantly, Dr. Reyes has been treating Claimant during the past one and one-half years, examining him every two weeks. I also note while Dr. Reyes will continue to follow Claimant's condition, he will defer to two orthopedic surgeons and one neurosurgeon as to the course to be taken in any future treatment. Nonetheless, I find Dr. Reyes was a credible witness qualified to render medical opinions in this matter and I assign significant weight to this treating physician's opinions. See Loza, supra, at 395.

Employer/Carrier argue Dr. Morgan has determined Claimant is fit to return to work. He testified he is of the opinion that Claimant has reached full MMI, without any work-related disability or restrictions. Although Dr. Morgan has been accepted by the parties as an expert in orthopedic surgery, he based his opinion on one visit with the Claimant, almost one year

after the accident occurred. Despite Claimant's complaints of pain at this visit, Dr. Morgan found no abnormalities in his physical examination of Claimant. I note, however, that at the time of the examination Claimant was taking Vicodin for his pain. Dr. Morgan placed great credence in a hand grip test he performed on the Claimant, a purely subjective test which indicated to him Claimant was "not trying" and put forth "minimal effort."[6] Although MRIs showed findings in Claimant's lumbar spine and right shoulder, and X-rays indicated spurring in the lower thoracic and lumbar spine, Dr. Morgan considered these conditions to be degenerative in nature, in light of the normal physical exam.

Dr. Reyes is of the medical opinion that Claimant has not yet reached MMI, nor is he able to return to work. He ordered MRI tests of Claimant's back which showed a central bulge at the L4-5 level, and a central right-sided disk herniation at the L5-S1 level. A physical examination resulted in no abnormal findings, but Dr. Reyes testified this was consistent with the lumbosacral MRI. He reported seeing two instances of objective, visible injuries: swelling in Claimant's neck and Claimant's limping on one leg. However, Dr. Reyes testified most injuries are invisible, and thus subjective.

In diagnosing subjective injuries, such as Claimant's paresthesias of the upper extremity, cervical sprain, lumbosacral sprain and shoulder sprain, Dr. Reyes stated roughly eighty-five percent of the diagnosis is based on the patient's history and complaints. Dr. Reyes believed Claimant to be sincere and credible, and a good medical history-giver. Similarly, I note Dr. Robert and Dr. Murphy also thought Claimant to have credible complaints of "actual, authentic pain." I also note that while Dr. McAffee did not have an opinion on this topic, he testified he defers to Claimant's treating physician, Dr. Reyes, as to Claimant's current physical condition. Accordingly, I find no basis to discount the opinions of Dr. Reyes.

Therefore, for the foregoing reasons, I find Dr. Reyes' opinion that Claimant suffers from paresthesias of the upper extremity, sprains in his cervical spine, lumbosacral spine, and shoulder, as well as bulging and herniated disks, to be more reasoned than Dr. Morgan's opinion.

In light of the testimonial and medical evidence of record,

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[6] It is noted that Claimant reported to Ms. Kampitsis he had had problems with his grip, which had resolved by January 24, 2002, the date of her evaluation.

I find Claimant is temporarily disabled from the date of injury, August 16, 2000, and continuing, based on his cervical and lumbar symptoms. Employer/Carrier argue Claimant has reached MMI, at least by the time he was examined by Dr. Morgan on July 2, 2001. However, Dr. Reyes, Claimant's treating physician, has determined Claimant is in need of further medical treatment from consulting specialists. In the U.S. Fifth Circuit Court of Appeals, under whose jurisdiction this matter arises, a claimant has not reached MMI when a physician determines that further medical treatment should be undertaken. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 126, 29 BRBS 22, 25 (CRT) (5th Cir. 1994). Moreover, Dr. Reyes has stated Claimant cannot return to his former work with Employer. Although Dr. Morgan stated Claimant could return to his former work, his opinion was based on one physical examination in which he disregarded Claimant's complaints and MRI findings. I find Dr. Morgan's opinion regarding Claimant's ability to return to work to be insufficiently reasoned as discussed above. Accordingly, I find Claimant has not reached maximum medical improvement in view of recommended medical treatment regimes and is temporarily disabled from August 16, 2000, and continuing.

Claimant has not reached MMI, and he has not exhibited an ability to perform any kind of work. Claimant testified that for the first six months following the accident he could barely move. Ms. Kampitsis' report from January 2002 indicates Claimant reported he is unable to stand for more than ten minutes, loses his balance when walking, has difficulty climbing stairs, kneeling, and reaching, is unable to bend and cannot lift objects more than five pounds. He is of the belief that if he had to work eight to twelve hours, he would pass out and be terminated. In light of the fact Claimant has not obtained work, nor has he been physically capable of doing work, I find he has been temporarily and totally disabled as of August 18, 2000, and continuing, and entitled to compensation therefor.[7]

E. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the

[7] Claimant contends Employer/Carrier denied compensation benefits in bad faith. I find this argument to be without merit, as Employer/Carrier filed a controversion immediately after receiving formal notice of the claim, which denotes no bad faith.

Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the

claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

In the present matter, Claimant has been unable to work since he left the Shell Auger on August 18, 2000. Dr. Reyes has not released Claimant to return to his former job, nor has Claimant demonstrated an ability to perform even sedentary employment. Ms. Kampitsis has conducted a labor market survey of all levels of employment, from sedentary jobs to galley hand positions. I find that this survey was premature as Claimant has not been released to work, is physically incapable of doing so at this time and, in the opinion of Dr. Reyes, is in need of further medial treatment. As I have found Claimant to be temporarily totally disabled, any showing of suitable alternative employment is not appropriate at this time.

F. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819,

821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a six-day worker and by 260 days for a five-day worker in order to determine average annual earnings. However, in the present case, Claimant did not work five or six day weeks; he worked fourteen days on, seven days off. Sections 10(a) and 10(b) do not sufficiently accommodate this work schedule.

In addition, Claimant worked as a galley hand for only thirteen weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(Thirty three weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(Thirty six weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(Thirty four and one-half weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Employer/Carrier argue 10(a) is applicable because Claimant's prior work as a school janitor was the "same" employment in which he was working at the time of his injury - it was custodial in nature and involved similar skills. However, Claimant's wage records indicate from 1994 to 1999 he earned a total average annual wage of $6,773.42,[8] resulting in a weekly wage of $129.49 ($6,733.42 ÷ 52 weeks = $129.49 per week) while working for the Tangipahoa School Board. His highest average weekly wage was in 1999, at $208.81 per week ($10,857.92 ÷ 52 weeks = $208.81 per week). (See EX-7, p. 4). Although Claimant only worked for Employer four months, his average weekly wage was $518.04 ($6,734.46 ÷ 13 weeks = $518.04 per week), almost five times his average weekly wage with the School Board. (See EX-10). "In such a situation, actual earnings by the claimant are not the controlling factor when they reflect claimant's earlier work in a lower paying job." Miranda v. Excavation Construction Inc., 13 BRBS 882, 886 (1981). Considering this large increase in Claimant's wages, to include his lower wage would not

[8] In 1994 he earned $7,752.36, in 1995 he earned $1,893.50, in 1996 he earned $3,153.12, in 1997 he earned $8,079.48, in 1998 he earned $8,664.11, and in 1999 he earned $10,857.92. Thus, $7,752.36 + $1,893.50 + $3,153.12 + $8,079.48 + $8,664.11 + $10,857.92 = $40,400.49 ÷ 6 years = $6,733.42 per year. (See EX-7, p. 4).

adequately or fairly represent his wage-earning capacity **at the time of injury**. For the aforementioned reasons, I find Sections 10(a) and 10(b) of the Act cannot be fairly applied, thus, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

Employer/Carrier assert that 10(c) is the best section to compute average weekly wage. However, they computed Claimant's average weekly wage by taking into consideration all of his earnings in 2000, including his earnings from Employer as well as his earnings from the Tangipahoa School Board. They argue that considering his income from the School Board in the beginning of 2000, along with his income from thirteen weeks of work with Employer, Claimant should be entitled to no more than the minimum compensation rate. Indeed, Claimant's total wages for the year 2000 average out to $285.15 per week ($2,960.50 + $6,734.46 = $9,694.96 ÷ 34 weeks = $285.15), resulting in the minimum compensation rate of $225.32. Employer/Carrier's argument is

based on the reasoning that the purpose of section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity **at the time of the injury**.

For similar reasons previously discussed, it is not reasonable nor fair to consider Claimant's earnings at the School Board when determining his wage-earning capacity, in light of his dramatic increase in wages with Employer. In Miranda v. Excavation Construction Inc., supra, the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the claimant's earning capacity at the time of the injury.

Claimant's wage records indicate he began working for Employer on April 27, 2000, was injured on August 16, 2000, and stopped working on August 18, 2000. His total earnings were $6,734.46. (See EX-9). He thus worked thirteen weeks for Employer before he was injured, and averaged $518.04 per week ($6,734.46 ÷ 13 weeks = $518.04 per week). Like Miranda, Claimant was earning more money weekly for the thirteen weeks of employment with Employer than he earned weekly in his previous four years as a school janitor. Thus, I find as the Board did in Miranda, that a calculation based on his increased wages at the employment where he was injured "would best adequately reflect Claimant's earning potential at the time of [his] injury." Accordingly, I find Claimant's average weekly wage was $518.04.

G. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The employer is liable for all medical expenses which are

the natural and unavoidable result of the work injury. For medical expenses to be assessed against the employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

In the present matter, Employer has been found liable for Claimant's August 16, 2000 work injury. Accordingly, Employer is responsible for all reasonable and necessary medical expenses related to Claimant's cervical and lumbar conditions. Dr. Reyes has reported that Claimant is in need of further medical treatment. While he is unable to provide the necessary treatment, he testified he will defer to the opinions of two orthopedic surgeons and one neurosurgeon, which I find to be reasonable and necessary given Claimant's complicated symptoms. One orthopedic surgeon, Dr. Morgan, has examined Claimant. Therefore, I find Employer/Carrier are responsible for Claimant's further reasonable and necessary medical treatment which includes, if requested, Claimant's referral to another orthopedic surgeon and a neurosurgeon.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own

initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

In the present matter, Claimant sought treatment at the emergency room and from Dr. Reyes before filing his claim for worker's compensation. Claimant testified after visiting the emergency room he requested medical insurance from Employer, and was turned down.[9] Although this denial may have been reasonable, it is nonetheless a denial of medical treatment by Employer. Thereafter, Claimant sought treatment from Dr. Reyes and has established such treatment was necessary for his injury. As such, I find Employer/Carrier additionally liable for the medical expenses incurred by Claimant prior to October 23, 2000, specifically his bill from the emergency room and Dr. Reyes.

H. Discrimination Against Employees Who Bring Proceedings

Under Section 48(a) of the Act, it is "unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer." The basis for this rule is that the person who filed the compensation claim is treated differently than other similarly situated individuals. Holliman v. Newport News Shipbuilding & Dry Dock Co., 852 F.2d 759, 761, 21 BRBS 124 (CRT) (4th Cir. 1988). However, such discrimination

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[9] Claimant argues Employer exercised bad faith in refusing to authorize medical treatment initially. Although Claimant requested and was denied a health insurance claim, such denial was not in bad faith. Claimant's employment records indicate he was not eligible for health insurance. (See EX-9). Moreover, Claimant testified at the time of the request he did not tell Employer the cause of his injury because he was "trying to save [his] job." (EX-22, p. 85). Therefore, I find this claim to be without merit.

must be committed by the employer **after** the filing of a claim to properly trigger Section 48(a) protection. Geddes v. Director, OWCP, 851 F.2d 440, 443, 21 BRBS 103 (CRT) (D.C.Cir. 1998).

In the present case, Claimant argues Employer engaged in bad faith in terminating him, and thus violated Section 48(a) of the Act. It is stipulated by both parties that Claimant filed his claim on October 23, 2000. (See JX-1). According to Claimant's employment records, he was terminated on October 4, 2000. (See EX-9). Ms. Bartholomew testified Claimant was terminated because he did not show up to work, not because he was injured. Furthermore, because no claim had been filed as of the date of termination, Employer could not have discriminated against Claimant in violation of Section 48(a). I therefore find that Employer did not exercise bad faith in terminating Claimant.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer/Carrier submitted a notice of controversion on October 24, 2000, the day after Claimant filed his claim and provided formal notice of his accident/injury. (See EX-17). I find this was timely notice, and therefore no penalty for payment of compensation under Section 14(e) of the Act attached.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a

fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[10] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for **temporary total disability** from **August 18, 2000, and continuing**,

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[10] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after April 20, 2001, the date this matter was referred from the District Director.

based on Claimant's average weekly wage of $518.04, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 16, 2000, work injury, pursuant to the provisions of Section 7 of the Act.

3. Employer/Carrier shall receive credit for all compensation heretofore paid, if any, as and when paid.

4. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 19th day of June, 2002, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge